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No. 82-1047

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

ONE ASSORTMENT OF 89 FIREARMS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI
FILED DECEMBER 20, 1982
CERTIORARI GRANTED FEBRUARY 22, 1983

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UNITED STATES OF AMERICA, PETITIONER

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ONE ASSORTMENT OF 89 FIREARMS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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RELEVANT DOCKET ENTRIES

DATE	NR. VOL I	PROCEEDINGS
3-31-77	1	COMPLAINT FOR FORFEITURE
4-4-77	2	WARRANT FOR ARREST AND NOTICE
4-4-77	3	ORDER (RWH) that Warrant for Arrest and Notice issue. CC: USA, USM for svc (2).
4-13-77	—	USM RETURNS (2) of service of Complaint, Warrant and Order on Patrick M.Mulcahey on 4-5-77 in Cola., S.C. and on Assortment of 92 Firearms at Bureau of Alcohol, Tobacco and Firearms on 4-5-77 in Cola.
4-18-77	4	ANSWER of Patrick M. Mulcahey, owner of property, with Letter of Mailing
4-18-77	5	CL[illegible]M of property described in Complaint by Patri[illegible] M. Mulcahey with Letter of Mailing.
4-20-77	6	JURY [illegible]EMAND BY LETTER by Deft. Patrick M. Mulc[illegible]ey
5-11-77	—	USM RE[illegible]URN verification of Publication of Warrant For A[illegible]est & Notice.
6-24-77	7	INTERROGATORIES of Plt to def. w/cert. of svc.
6-29-77	8	MOTION To Amend Complaint, by plt w/cert. of svc. *(ref. 7–*
7-6-77	9	ORDER (RWH) granting plt's motion to amend complaint. 1cc to USM for service.
7-6-77	10	WARRANT FOR ARREST & NOTICE One copy to USM for Svc.
7-6-77	11	ORDER (RWH) that Warrant for Arrest & Notice issue for property added by amendment to original complaint 1 copy to USM w/Complaint for Forfeiture
7-6-77	12	ORDER (RWH) for four firearms to be delivered to Mrs. Patrick M. Mulcahey.
7-7-77	—	CERTIFICATE OF SERVICE of Order to Amend Complaint, Warrant For Arrest & Notice, and certified copy of Order For Arrest on def's counsel by Plt
7-12-77	—	USM RETURN service of Complaint, Motion, Order to Amend Complaint, Warrant For Arrest & Notice & Order For Arrest & Notice served 7-8-77 on the firearm described in motion at Bureau of AT&F
7-18-77	13	CLAIM OF PROPERTY DESCRIBED IN Complaint by Patrick M. Mulcahey, owner of property, by def w/ltr of mailing

7-18-77	14	ANSWER TO AMENDED COMPLAINT by Patrick M. Mulcahey, owner of property, with letter of service.
8-1-77	—	USM RETURN on delivery of the following weapons to Mrs. Patrick M. Mulcahey on 7-29-77: Winchester .22 cal. Model 190 Rifle; Remington .22 Cal. Rifle Mohawk SN 2324; Remington Mohawk .22 cal. Rifle SN 23244; and Kurz 9 mm Backup Model Automatic Pistol SN A03183
9-6-77	15	REQUESTS FOR ADMISSIONS to plt by Defs. w/letter of svc.
9-6-77	16	OBJECTIONS TO PLT'S INTERROGATORIES by defs. w/letter of svc.
9-12-77	17	MOTION by Plt to require answers to Interrogatories w/cert. of svc. *2-16-78*
9-12-77	—	MEMORANDUM (RECEIVED) of plt in support of motion w/CS
9-12-77	18	MOTION by Plt to strike from Answer, w/CS *(ref. 11-14-78)*
9-12-77	—	MEMORANDUM (RECEIVED) in support of plt's motion to strike w/cert. svc.
9-13-77	19	AFFIDAVIT of Carl M. Regal verification of publication
9-30-77	20	ANSWERS TO REQUESTS FOR ADMISSION by Plt w/cert. of svc.
11-9-77	—	MEMORANDUM (RECEIVED) of def. in opposition to plt's motion to require answer to interrog. w/ltr
11-9-77	21	MOTION For Summary Judgment by defs. w/ltr s *(ref. 11-14-78)*
11-9-77	—	MEMORANDUM (RECEIVED) of defs. in opposition to plt motion to strike and Memorandum in support of defs' motion for s/j w/ltr of svc.
11-22-77	—	MEMORANDUM (RECEIVED) by the pltf. in opposition to pltf's motion to strike & in opposition to defs' motion for s/j.
11-22-77	—	REPLY MEMORANDUM (RECEIVED) by pltf. as to memo. from def. in opposition to pltf's motion to require answer to int
11-22-77	22	MOTION by the pltf. for the court to require Patrick Mulcahey to make himself available for the taking of his deposition if the court concludes that he is not required to answer pltf's interr. *(ref. 2-15-78)*
11-22-77	—	MEMORANDUM (RECEIVED) by the pltf. in support of motion re: Patrick Mulcahey.
12-20-77	—	BAR MEETING (RWH/gg) Non-Jury roster not sounded.

2-15-78	23	ORDER (RWH) that Patrick M. Mulcahey make himself available for taking of his deposition. cc counsel.
2-16-78	24	ORDER (RWH) that plt's Motion To Require Ans. To Interrogatories dated Sept. 12, 1977—is granted. cc counsel
3-23-78	25	ANSWERS TO PLT'S INTERROGATORIES by Patrick M. Mulcahey, def w/cer svc
3-31-78	—	CANCELLATION OF HEARING S/J motion hearing scheduled 4-4-78 cancel at request of plt counsel due to involvement in SLED case State Court
9-29-78	—	PRETRIAL MEMORANDUM (RECEIVED) by pltf w/letter of svc
10-2-78	—	BAR MEETING (RWH/gg) For Trial. (2nd during 10/30/78 term)
10-2-78	—	MOTIONS HEARING (RWH/gg) Motions taken under advisement. Order to be filed within 10 days. (Court will certify for appeal)
10-2-78	26	NOTICE OF INTENT to Use Evidence, by Govt. (transcript of testimony of Kenneth E. Williford, deceased)
10-4-78	27	NOTICE OF OBJECTION to use of Evidence, by defs. w/ltr svc *(ref. 11-29-78)*
11-14-78	28	ORDER (RWH) that def's motion for summary judgment is denied and plt's motion to strike the second & third defenses of Answer is granted. (The court schedules a post-decision status hearing 11-27-78 at 10:00 a.m.) (MLD)
11-27-78	—	HEARING (RWH/gg) Arguments on Govt's. Notice of Intent to Use Evidence (fld. 10-2-78)—Court will allow evidence in. (Mr. Craig to submit proposed Order) Case to be set for Jury Trial at next term in Columbia.
11-29-78	29	ORDER (RWH) that def's objection to use of transcript of testimony of Kenneth E. Williford, deceased, is *denied*. (MLD)
1-[illegible]-79	30	NOTICE OF DEPOSITION by def. of David Whetstone w/ltr of svc
8-20-79	—	BAR MEETING (CES, JR/ln) Counsel advise no issue for jury. To be submitted on Briefs. 2 weeks for pltf to file brief. 1 Week thereafter for Reply Brief.
9-7-79	31	PETITION (REF: 9-7-79) by plft. for extension of time in which to file trial brief, w/cert. mailing.
9-7-79	32	ORDER (CESjr) the time within which pltf. must submit its brief is extended no later than 20 days after receipt by pltf. of transcript of the criminal action. eod 9-7-79. mld.

10-10-79	—	BRIEF (RECEIVED) by pltf.
1-24-80	—	BRIEF of claimant, w/ltr. of hand delivery on USA.
3-4-80		SUPPLEMENTAL BRIEF (RECEIVED) of claimant w/cert. mailing.
3-4-80	—	SUPPLEMENTAL BRIEF (RECEIVED) of claimant w/cert. mailing.
out of sequence		
9-15-80	—	PETITION (REF 9-15-80) by govt to supplement record w/cpy of transcript of CR 77-13 proceedings w/cert of svc.
9-15-80	—	TRANSCRIPT OF PROCEEDINGS (RECEIVED) supplied by govt to supplement record Vol. II
9-10-80	—	LETTER (RECEIVED) by deft. showing no obj to Petition filed 9-15-80
9-15-80	32	APPLICATION FOR DELIVERY OF GOODS by Adm of General Services, Stephen R. Durke Regional Counsel, Region 4, w/attachment for delivery of said items to Adm office, Bureau of Alcohol, Tobacco, and Firearms, Atlanta, Ga.
9-22-80	—	LETTER (RECEIVED) by dft. showing opp to Appl for deliv of goods to BATF
10-31-80	—	MOTION (REF 12-30-80) (RECEIVED) by deft. to restore case to jury calendar w/letter of mailing
12-30-80	—	TRANSCRIPT OF CRIMINAL ACTION filed and made part of the Record Vol. III.
12-30-80	34	BRIEF (FILED) of pltf. filed and made part of the Record
12-30-80	35	BRIEF (FILED) of claimant Patrick M. Mulcahey filed and made part of the Record.
12-30-80	36	SUPPLEMENTAL BRIEF (FILED) of claimant Patrick M. Mulcahey filed and made part of the Record.
12-30-80	37	ORDER (CES, JR) that w/the exception of those firearms labeled in claimants CR trial as exhibits 14, 24, 39, 59, 77, 78, 91, 97 and 109, are subj. to forfeiture under 18 U.S.C. § 924(d) forfeiture is hereby Ordered; that govt's exhibits 14, 24, 39, 59, 77, 78, 91, 97, and 109 shall be rtn to owner as described in ¶ 14 of this Order; that caption of action be changed from 93 to 89. MLD EOD 12-30-80
12-30-80	38	ORDER (CES,JR) denying claimants motion to restore action to the Jury Calendar, MLD EOD 12-30-80 JS6
1-7-81	39	MOTION by the claimant for stay pending appeal w/c. of svc.
1-7-81	—	MEMORANDUM (RECEIVED) By the claimant in support of its motion for stay pending appeal w/c. of svc.

1-7-81	40	NOTICE OF APPEAL by the claimant CC's to counsel, Court Reporter, 4CCA and Court (CES, JR.).
1-20-81	—	TRANSCRIPT PURCHASE ORDER (RECEIVED) By the claimant.
3-16-81	—	APPLICATION (RECEIVED) by GSA for delivery of seized property to New Mexico.
3-16-81	—	APPLICATION (RECEIVED) by GSA for delivery of seized property to Washington, DC
3-16-81	—	APPLICATION (RECEIVED) by GSA for delivery of seized property to Georgia
3-16-81	—	APPLICATION (RECEIVED) by GSA for delivery of seized property to Washington
3-16-81	—	APPLICATION (RECEIVED) by GSA for delivery of seized property to Maryland
3-16-81	—	APPLICATION (RECEIVED) by GSA for delivery of seized property to Washington, DC
4-15-81—		LETTER (RECEIVED) by plt. stating no objection to motion of claimant for stay pending appeal.
4-24-81	41	ORDER (CES, Jr) that pursuant To Rule 62(d) and FRAP Rule 8 order for judgment of 12-30-80 shall be stayed until determination of appeal; no superseadeas bond is required. (EOD 4-24-81) MLD.

COMPLAINT FOR FORFEITURE
(CIVIL No. 77-0590)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No.

UNITED STATES OF AMERICA, PLAINTIFF,

v.

ONE ASSORTMENT OF 92 FIREARMS, (SEE ATTACHED LIST)
DEFENDANTS.

COMPLAINT FOR FORFEITURE

The United States of America, Plaintiff, by its Counsel, the United States Attorney for the above-mentioned District, through this Complaint, in a civil cause of forfeiture for breach of the provisions of 18 U.S.C., Section 924(d), upon information and belief alleges as follows:

FIRST: That at all times hereinafter mentioned, Plaintiff was and is a sovereign power.

SECOND: That all and singular the allegations hereof are within the jurisdiction of the United States and of this Honorable Court.

THIRD: The commencement of this suit has been authorized, sanctioned, and directed in accordance with the provisions of 26 U.S.C. 7401.

FOURTH: Under the facts alleged herein and the provisions of the sections of the statutes of the United States enumerated herein, said property described in Paragraph Fifth below became and is forfeited to the United States.

FIFTH: That on January 20, 1977, Special Agents of the Bureau of Alcohol, Tobacco and Firearms, Treasury Department, did seize on land in Richland County, South Carolina, within the Judicial District of South Carolina, Columbia Division, as forfeited to the United States, certain property to wit: One Assortment of 92 Firearms (See Attached List) which property was used in violation of the

laws of the United States as alleged in paragraph Sixth hereof. Ever since said seizure said property has remained in the Judicial District of South Carolina in the custody of the Bureau of Alcohol, Tobacco and Firearms Office, 901 Sumter Street, Columbia, South Carolina. That at the time of said seizure said property was appraised at $5,507.00.

SIXTH: That said firearms were had and possessed and used and intended to be used on January 20, 1977, and prior thereto by Patrick M. Mulcahey in Richland County, South Carolina, in violation of the laws of the United States by engaging in the business of a dealer in firearms and ammunition without the said Patrick M. Mulcahey having first applied for and received a license as a dealer in firearms and ammunition as required by 18 U.S.C. 923(a); and said firearms having been used and intended to be used and involved in said unlicensed firearms business in violation of 18 U.S.C. 922(a)(1) and 923(a), thereby became forfeited to the United States under the provisions of 18 U.S.C. 924(d).

WHEREFORE: The United States, Plaintiff herein, prays that due process issue to bring said property within the jurisdiction of this Court by arrest and that notice issue to all parties in interest to appear upon the return day of such process and duly intervene herein by claim and plea in the premises; and due proceedings being had thereon, that for the cause aforesaid, the said property be condemned as forfeited to the United States and a decree for the proper disposal thereof be made.

THOMAS P. SIMPSON
United States Attorney

BY: GLEN E. CRAIG

GLEN E. CRAIG
Assistant United States Attorney
Attorneys for Plaintiff
151 United States Court House
Columbia, South Carolina 29201

MARCH 31, 1977

INDICTMENT
(Criminal No. 77-00013)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Criminal Number 77-00013
18 USC 922(a)(1)
and 924(a)

UNITED STATES OF AMERICA

v.

PATRICK M. MULCAHEY

INDICTMENT

THE GRAND JURY CHARGES:

Beginning on or about the 12th day of May, 1976, to the return date of this Indictment, in the District of South Carolina, PATRICT M. MULCAHEY unlawfully and knowingly did engage in the business of dealing in firearms without being licensed to do so under the provisions of Chapter 44, Title 18, United States Code, in violation of Title 18, United States Code, Sections 922(a)(1) and 924(a).

A True Bill

FOREMAN

/s/ MARK W. DUYOK, JR.—EWR

United States Attorney

TRIAL TESTIMONY OF PATRICK M. MULCAHEY
(Criminal No. 77-00013)

[235] BY MR. LOUTHIAN:

Q Would you state your full name, Mr. Mulcahey?

A. Patrick Martin Mulcahey.

Q. Now, you are going to have to talk a little louder, Pat, so everybody can hear you.

A. Patrick Martin Mulcahey.

Q. Where do you live?

A. 1407 Woodlawn Avenue in Columbia.

Q. How long have you lived there?

A. About twelve years, I think.

Q. Are you married?

A. Yes, sir.

Q. Is your wife employed?

A. Yes, she works for the Post Office. She teaches people to work on these computers that they have.

Q. And do you have children?

A. Yes, sir, I have four.

Q. Are you engaged in any kind of business venture of your own?

A. Yes, I run a surplus business.

Q. What do you mean by surplus business?

A. Well, primarily military surplus but I also sell [235] camping equipment and books, too.

Q. Mr. Mulcahey, just generally tell the jury what kind of surplus business you are in, that is where you get your surplus materials and how you advertise them and how you sell them.

A. Well, most of my commercial surplus I get from wholesalers and the military surplus I get from wholesalers in North Carolina and Georgia. The government sells things in such big lots that I usually can't afford to buy directly from the government and I buy from the people that buy from the government.

Q. What types of things do you buy from these wholesalers?

A. Sleeping bags, field jackets, fire starting tablets, just—I think I have about four hundred items for sale.

Q. How do you advertise these items?

A. By mail order in the Shotgun News and other publications like that.

Q. Are you talking about sporting magazines and publications for sportsmen?

A. Yes.

Q. When you say Shotgun News, I guess that's a periodical that a lot of sportsmen read, is that right?

A. It's a newspaper that comes out every two weeks and it used to be primarily guns but it's kind of over the years [236] its kind of changed until it's surplus and things of that nature.

Q. What do you call your business, Pat?

A. PGS.

Q. What does that stand for?

A. Pat's Government Surplus.

Q. How long have you been in the government surplus business?

A. I think about nine years.

Q. And did you at one time have a federal firearms license?

A. Yes, I did.

Q. Do you know when you first got it? Or how long you kept it?

A. I think that I got the federal firearms license in 1966 and I had it through 1975.

Q. Were you selling and dealing in firearms during that period of time?

A. Well, yes, I was but it was not a—well, until the '68 gun law went into effect I sold guns at gun shows and—but after the '68 gun law went into effect it made it so you couldn't sell guns at gun shows. So that's when I started changing over to surplus.

Q. Did you find it profitable to continue to sell guns under the '68 Gun Control Act?

[237] A. Well, actually it's not really profitable at all to sell guns. There is not really that much markup on guns. I think Smith and Wessons have a 19 percent markup and Colt is about the same, and it's really not a big enough markup to make very much money at.

Q. Let me see if I understand you. If you buy a new Colt gun from the manufacturer for a hundred dollars, how much do you sell it for?

A. Well, it would sell for around a hundred and twenty dollars.

Q. And you considered that not enough of a profit margin to make any money?

A. No, it's not. You see, in a business you have to take all your expenses out of your profit and—well, like Sears and Roebuck works on a 38 percent profit margin gross, and I think they end up with about two percent profit.

Q. I see. Where do you operate your surplus business, Pat?

A. Out of my home.

Q. And do you have any signs or anything outside your house indicating what kind of business you are in?

A. No, my business is primarily mail order and I have a bad storage problem and then I'm having, I have to all the time keep large quantities of boxes on hand of various sizes to send out the orders in, and it's just, I just prefer to [238] sell things mailorder.

Q. Now, tell us a little bit about the profit in the surplus business. How does that compare with the profit in the gun business?

A. The profit in the surplus business is very good. You—it's not difficult at all to make a fifty percent profit which is doubling your money. And I sell some items that I quadruple my money on. There's quite a bit of—it varies from item to item and even from time to time that you purchase the same item.

Q. You told us that you buy by mail. Do you sell mostly by mail?

A. Yes. I'm almost, I would say probably 95 percent mailorder, maybe more. The people that come by are usually friends of mine and they will come by and buy something and will talk for a while, and occasionally another wholesale dealer will come by and buy or sell some things to me.

Q. Now, Pat, let me hand you this picture which is government's exhibit 110, and ask you if that is part of your surplus business in your home?

A. Well, it's part of the surplus business and it's also the boxes that I have to keep. It's piles of boxes there and piles of boxes there, because, you know, I'm always short of boxes.

Q. All right, now, where else do you advertise besides [239] the Shotgun News?

A. Shooting Times. I have advertised in Illinois Outdoors, Gunweek, Vigilanti Magazine, Soldier of Fortune Magazine.

Q. What do you typically advertise in these magazines?

A. Mountain climbing and rapelling rope, sleeping bags, jungle fatigues, field jackets, triox and heating bars, things of this nature.

Q. Do you advertise any firearms?

A. No.

Q. Have you advertised any firearms since your license was terminated back in '75?

A. No, no, I haven't. Last year, I believe, I spent somewhere over two thousand dollars on advertising, and—no, that was in '75, and in '76 I believe I spent over twenty-four hundred dollars in advertising, and there was no firearms advertised.

Q. Are you listed in the newspaper, local newspaper, as having any kind of business, a local ad?

A. No. If you do that then people start coming by and mailorder takes a lot of time because there is a lot of correspondence plus putting things in boxes and taking them to the Post Office, and I would prefer just to deal through the mail.

Q. Do you have any advertising in the telephone [240] directory of your business?

A. No, no, I don't.

Q. Do you have a listing for your business in the telephone directory?

A. No, I don't.

Q. Now, Mr. Mulcahey, you were in your home on January 20th of this year when the agent came and took these guns from your house, were you not?

A. Yes, sir.

Q. And could you come down here and point out to the jury whether or not these guns, or any of them, belong to other members of your family?

A. Yes, sir.

Q. Okay.

A. This belongs . . .

Q. We will have to refer to this by exhibit number to keep the record straight. This is government's exhibit number 14 which looks like an old single-barrel shotgun.

A. This is my oldest little boy, his 16 gauge. His grandmama gave that to him.

Q. How old is your boy?

A. Twelve. This belongs to one of my girls. They each have one, so there should be another one.

Q. This is government's exhibit number 59 which appears to be a .22 caliber semi-automatic.

[241] A. Lugar 66. One of them belongs to my oldest girl and one of them belongs to my younger girl.

Q. All right, this other one is exhibit number 24. These are identical, I believe.

Q. This belongs to my oldest boy.

Q. This is government's exhibit number 91 which is what kind of a gun?

A. It's a Luger 44 magnum, semi-automatic.

Q. With a scope?

A. With a scope.

MR. RUSCHKY: I'm sorry, Mr. Louthian, whose gun was that?

MR. LOUTHIAN: The oldest boy.

A. This belongs to my younger boy—no, I'm sorry, that's not right. This belongs to my youngest boy.

Q. This is government exhibit number 39. It belongs to your youngest son?

A. Yes, sir.

Q. What kind of gun is this?

A. .22 rifle, Winchester.

Q. With a scope?

A. Yes, sir.

Q. You say it was a Christmas present?

A. Yes, sir.

Q. When was that?

[242] A. Last year.

Q. Was the stock broken when you saw it last?

A. No, it wasn't.

Q. Was it broken on the 20th?

A. I don't know when it was broken. It was not broken the last time I saw it.

Q. And it's one year old?

A. Yes. This belongs to my youngest little boy. It's a 410.

Q. Government exhibit number 109 is a single barrel 410 shotgun that belongs to your son?

A. And this belongs to my oldest boy. This is his .22 rifle. His grandfather gave him that.

Q. Exhibit number 97 which is a .22 pump rifle. You say it belongs to which son?

A. My oldest son.

Q. And where did he get it?

A. His grandfather gave it to him.

Q. How long ago?

A. Well, his grandfather gave it to me to keep until he was old enough to get it. I don't think he was but about four or five when he—when my father gave it to me and said when my little boy was old enough that he would, he should get it.

Q. It was owned by your father, then, as I understand [243] it?

A. Yes, sir.

Q. It appears that there is something wrong with the slide. Is that . . .

Q. The screw has come out sometime since it left my house. I believe that is the extent of everything that belongs to my children.

Q. Are there any guns here other than these that have been in your family for a long period of time?

A. This belongs to my wife. She signed for that.

Q. All right, this is government's exhibit number 77?

A. Yes.

Q. Which is a .38 nine millimeter backup automatic pistol.

A. There is a .22 pistol here someplace. This belongs to my wife.

Q. This is government's exhibit number 78 which is a .22 pistol, a Browning automatic?

A. Yes.

Q. And that belongs to your wife?

A. Yes, sir.

Q. And there are other guns out here that have been owned by either you or members of your family for a long period of time?

A. Yes, sir, there is a 410 single-barrel shotgun that [244] my grandfather gave me when I was 11 years old.

Q. Is that out here?

A. Yes, sir, it ought to be out there someplace.

Q. All right, sir, let's see if we can find it. This looks like a 410 breakdown single-barrel.

A. Yes, I believe that's it, yes, sir.

Q. This is government's exhibit number 96. You say your grandfather gave it to you when you were 11 years old?

A. Yes, sir.

Q. Have you owned it continuously since then?

A. Yes, sir.

Q. Anything else?

A. I have—there is a .22 caliber High Standard pistol with, it's got white grips on it. No, that's a newer one. It's a very old looking—yes, that. My father gave me that when I was 15 or 16. I can't remember which.

Q. This is government's exhibit number 75?

A. Yes, sir.

Q. And you have owned that since you were 15 or 16?

A. Yes, sir.

Q. Anything else?

A. The first handgun I ever purchased is the Polish gun that the man said was a curio. I don't know.

Q. Can you see it from up there without getting down?

A. Yes, sir, it's right in front of Mr. Holland and [245] it's got black grips—no, close to—you are almost leaning on it. No, you are almost leaning on it.

Q. This? Government's exhibit number 79?

A. Yes.

Q. This is the first handgun you ever owned?

A. Yes, I bought that for $15.00.

Q. When did you buy it?

A. 1958 or '59. It's been a long time ago. I have had it more than half my life.I was still in high school when I bought it.

Q. Anything else you can think of, Pat?

A. I've got a M-1 rifle over there that I bought, I think when I was 18 years old. It's closer to—back the other way—right there.

Q. Here it is. This is the old M-1 that you ran?

A. Yes.

Q. World War II model?

A. Yes, sir.

Q. Government's exhibit 26. And when did you get that?

A. I think I was, I think I was 17.

Q. Can you think of any others?

A. I don't really know. The browning high power that is there someplace, I have had. My father gave me that, I think, twelve yars ago.

Q. Can you point it out down here?

[246] A. Yes, it's behind the little box. I believe that's it.

Q. Does this look like it?

A. Yes, that's it, and . . .

Q. Government's exhibit number 83.

A. And there's—I'm sure there is, you know, other ones that I just can't think of.

Q. Well, it might come to you later. Let me ask you this, Pat, when did you first get interested in guns as a hobby?

A. Well, I guess I was about 15 when I first, I got a job for two days and went down to Sears and they had a damaged .22 rifle and I bought it. That was the first one I ever bought, and then . . .

Q. State whether or not you have been collecting guns since that time?

A. Yes, I have been collecting them and trying to build up a nice collection and I think I have a real nice collection—had, I don't now.

Q. This is the last one I'm going to ask you about right now, Pat, but this is government's exhibit number 15. What is that?

A. That's a Centinnel '66. It was put out on the hundredth anniversary of Winchester Arms Company and that's supposedly real gold plating on there. I think maybe it was [247] because gold was a lot cheaper back then.

Q. Do you know when you bought it?

A. I traded a fellow another rifle for that rifle. It was not too long ago.

Q. Does that have any use as a hunting weapon or sportsman's weapon?

A. I guess you could take out in the woods if you wanted to. It's kind of pretty to be, you know, beating around in the bushes with.

Q. All right, Pat, I'm going to call your attention now to May of 1976, and ask you whether or not at that time you had a license to be a firearms dealer?

A. In May of 1966?

Q. No, last May.

A. No, sir.

Q. All right, now, did anyone approach you about buying some guns from you? If so, who was it?

A. I—this fellow, Mr. Kenneth Williford, one afternoon he come to my door and knocked on the door and said that he had heard that I was a gun collector and that I had some guns that I might want to trade him or sell.

Q. Did he tell you what kind of business he was in, if any?

A. He told me that he was, that he was a disabled person; that he had been disabled about five years previously [248] in an accident at the Savannah River Project; that he was a crane operator foreman, I believe, and that he had gotten his leg hurt and that he was collecting Social Security benefits; that this was all the money that he had and he went into a long story about how Charlie Daniels, which the construction company had beaten him out of any kind of a

settlement in some way and that—well, all of this, you know, this, I mean he introduced himself first and then he, you know, started talking and he brought in this Enforcer pistol with him that he told me that he might want to trade or even sell. And I was interested in it. I had never owned one and I have wanted one. And he—anyway, we talked for about an hour or an hour and a half.

Q. And did he identify himself as a gun collector or having any knowledge about guns?

A. Yes, he did. He told me that he collected them when he could but that he didn't, he was not, he didn't really have the money to collect them any more and that he would usually buy them and keep them for a little while or buy them knowing there was someone else willing to, that he could sell it to, and that he would, that's why he bought them.

Q. Did he ask you whether you had any guns for sale?

A. Yes, he did. He asked me if I had any that I wanted to sell.

Q. Now, let me ask you this, Pat, because it's very [249] important. Who made the first mention of buying or selling guns?

A. Oh, he did. I mean he—I was back in the back of the house packing up packages and he knocked on the front door and I opened the front door and there he was, and he did, I mean I . . .

Q. Had you ever seen him before or heard of him?

A. No, no, I had not.

Q. Now, did you make any transaction or did he buy anything from you at that time?

A. His first visit, as near as I can remember—now, it's been almost a year, but as near as I can remember he came to see me six or seven times in all, and on his first occasion that he came he asked me if I had some firearms that I did not, you know, that I was willing to sell, and I told him that I had some that I didn't particularly want and that what I preferred to do, what I wanted to do instead of selling them was to trade it for his Enforcer pistol. And I showed him several and I said, "There are several of them here that we could work out a trade on."

Q. Who first mentioned the Enforcer? Did you tell him you were looking for one or did he tell you he had one?

A. No, he brought it with him into the house. Now, I don't think he brought it initially to the door. No, he didn't bring it initially to the door. He came to the door [250] and he came in and we talked for 15 or 20 minutes about, you know, general guns and collecting and things like this, and he said that he had something in his car that he bet I would be interested in. And at that time he went back out to his car and he came back with the Enforcer pistol.

Q. Is an Enforcer hard to get? Are they rare?

A. No, not especially. Well, they are not a very common weapon. They are, I imagine that you could get a dealer to order you one, but there are not many of them around.

Q. Okay. Well, on that first visit do you know whether or not he bought this gun, or a gun?

A. No, he didn't buy anything his first visit. He told me that he would have to come back the next week because he was not, he did not have any money; that he was, that he would have to get up the money to buy it. And I said, "That's fine, it's not going anywhere." And, you know, "If you want it."

Q. Did he express interest in a particular gun?

A. Not in a particular gun. He told me he was looking for a 357 magnum with a short barrel, and I had that Lugar 357.

Q. Did you show it to him?

A. Yes, I did.

Q. Now, did anything else of significance happen that [251] time?

A. Well, we just talked for about an hour and he asked me about, he asked me if I had any quantity of guns that I wanted to sell. I told him that I didn't, and he told me that he had two friends of his from up North that would come down and pick up guns if I wanted, if I had any number of them to sell. And I told him that, I told him, "I don't have that many guns that I want to sell, that I want to get rid of, and on top of that that's against the law. You can't"—you see, my whole impression of him was that he was not a very

well educated person and that he had kind of fallen onto hard times and he was looking for a way to make ends meet, which he told me his wife had diabetes. Later he told me he had diabetes. He told me that the only thing he got from, was just a small Social Security pension and that he needed to make, he needed to make some money to pay for his wife's doctor bills and he, but it was, I got the impression that he was ignorant of the law and I was, I told him that you cannot sell guns to out-of-state residents, that this is a violation of the law. And he also asked me if I knew where he could get an AK-47.

Q. What does an AK-47 mean?

A. Well, it's a Soviet designed rifle. It's an assault rifle and it has a selector switch on it so that it can be fired full automatic. It's primarily a semi-automatic [252] weapon but it does have a selector switch.

Q. What did you tell him when he asked for an AK-47?

A. Well, I told him that an AK-47 had a selector switch on it which made it classified as a machine gun and that was something he certainly didn't want to get into because the ATF was really hot on machine guns and if they caught him he would do time. And that was almost my exact words.

Q. What else did you all talk about on any of these several visits?

A. Well, it's, he asked me one time if I knew where he could get any explosives and I told him that, I told him, "Sure," I knew where he could get explosives. He's got a farm. Go down across from the Horseshoe to the Federal Building, buy a license, I think it costs a dollar, and he can buy all the dynamite he wants.

Q. Did he want you to get explosives for him?

A. Well, no, he didn't ask me directly if I had any explosives. He asked me did I know anybody that had any. That was not really couched in a, "Do you have some that you want to sell?"

Q. What else did you talk about?

A. Well, he told me a lot about himself. I think on the third visit he told me that he was fighting with the Veterans Administration, that he had spent a long time in the Army and that he had become disabled in some way. It

[253] was through some service-connected disability and that he had, because, you know, his whole, what he actually said was that he had served in the Army for a long time and he made one mistake which was he got mad at a Captain and beat him up and that the Army, that they kicked him out of the Army because of that and that he didn't think that was fair because his disability was service-connected. I think he . . .

Q. Was there a later discussion about his discharge from the Army?

A. Yes, there was on his third visit. On his third visit he told me that he wanted to buy a model 39 Smith and Wesson pistol and I had one. In fact, I had two and I told him that I would probably, you know, I would want to sell one. I didn't especially want both of them. And he—I got it for him, he looked at it and he said, "Could you put this aside for me until next week when I have some money?" and I said, "Sure", you know, "that's fine." And so then we went on talking and it was at this time that he told me that he had been kicked out of the Army for beating up a Captain. And I didn't think anything of it at the time, but later it occurred to me that if he was dishonorably discharged that he was not eligible to buy a weapon, and the next time he came back, which—excuse me, that wasn't the third time, I think that was the fifth time that he came. The third time that he came I believe he bought the Tarus. That was the [254] fourth time. That was the fourth time he came, I believe, that he said that he would like to buy the Smith and Wesson next week, and anyway I thought about it and the next week when he came I asked him, I said, I asked him, "Did you tell me that you had been dishonorably discharged from the Army?" And he said, he said, "No." and I said, "Well, you told me you were kicked out of the Army last week when you came by." And he said, "Well, you must have misunderstood or made a mistake, or, you know, but I didn't tell you that."And I said, "Well, I'm sure you did, and you are going to have to, what I want you to do is to fill out one of these yellow forms for me because if you are dishonorably discharged you are not eligible to buy a gun and I have to"—I explained to him, I said, "You have

to fill these questions out at the top and you have to put down the proper answer for each one of these questions, and if you have been dishonorably discharged you will have to answer yes and then I'm not going to sell you anything, and you had better answer them truthfully because I'm going to keep that piece of yellow paper with my records, you know, with my papers and if anybody should ever come to me about having sold you a gun I'm going to produce that as proof that I sold it in good faith", and that he lied in order to purchase a weapon, and ...

Q. You are referring to government's exhibit number 111, form 4473?

[255] A. Yes, that's right.

Q. Did you require him to identify himself by any means on that form?

A. Yes, his driver's license. The number is down here.

Q. And is that when you sold him this gun, this model 39?

A. Yes, that's right

Q. Government exhibit number 4?

A. Yes.

Q. That was after he signed the form?

A. Yes, this was a peculiar incident, because when I asked him to sign the form there was this kind of long silence and he got really, he got really angry at me for asking him to sign the form, and he just stood there, I guess for about a half a minute and just, you know, he was very aggravated about me asking him to sign the form, and his friend, George, who he introduced as his cousin, after about, after a while of this silence it got kind of embarrassing and he said, "Go ahead and sign it, Whitey." And so then Mr. Williford filled out, answered the questions and signed his name and I put, I asked him for his driver's license and put his name and address at the top and his driver's license number down in the little space that's made for it, and ...

Q. Was there any discussion between you and George [256] about George having been convicted of shoplifting?

A. Yes, George told me, he was standing there kind of, he had kind of an embarrassed grin on his face and he kind

of stood there and he said, "Well, you know I can't sign for the gun because, you know, well, you know." And I said, "Why can't you sign for the gun?" And he said, "Well, because I have been convicted of a crime that carries over a one-year sentence." And I said, "Well, what have you been convicted for?" and he said, "Shoplifting." And, you know, I said, "Well, I didn't know shoplifting carried a one-year sentence." And he told me, I think he said that he used to live in Georgia and in Georgia it did, or something like that. That's not exact, you know.

Q. Now, Pat, on the total number of visits that Whitey and George came to see you, I believe you sold them three guns?

A. That's right.

Q. That's government's exhibit number 4, number 3 and number 2. Now, how long did it take Whitey to buy that first gun from you? Include all the visits and whole time to the best of your recollection.

A. Well, he came by, he came by one week, the first time he came by and he stayed probably about an hour and a half, and we mostly just talked and he saw the gun and he said that he liked it and that if I would, you know, if I [257] would put it aside he would come back next week. And the next week he came back and he, he would, I think he stayed about an hour that time and we talked a lot and he bought the gun, he paid me the money for it, and . . .

Q. Who paid you for it?

A. Mr. Williford.

Q. How much did he pay you?

A. One hundred and thirty dollars ($130.00).

Q. Did you make any profit at that price?

A. I don't really, I don't really think I did. I'm not—if I remember properly that was just about what I had in it. I'm not—I had bought the thing, I had been attracted to the gun and it just, it looked a lot better than it was. It wasn't really something that I felt like keeping.

Q. Now, when he bought the second gun how much time did he take with you before you sold it to him?

A. Well, I guess, I guess that would be on, I think, his third visit and I believe that he spent about forty-five minutes there, maybe, right around forty-five minutes.

Q. That's when you sold him the Tarus?

A. Yes, yes.

Q. Who put the price on it?

A. As near as I can remember, it was him that put the price on it.

[258] Q. What kind of price did he want to pay you?

A. Well, he offered me ninety dollars ($90.00) for it.

Q. How much is it worth?

A. I guess it's worth right around ninety dollars.

Q. Now, when you sold him the nine millimeter Smith, the automatic, how much time did you spend with him before you agreed to sell him that gun?

A. Well, he came, he came on a fourth visit and he looked at the gun and we talked, I guess for about somewhere between a half an hour and an hour and we talked and he, he was, he told me that he had sold the Tarus revolver that he had bought the previous week and that he had sold it for a hundred and twenty dollars and that he was, you know, that the money really came in handy and that his wife was ill and he was real happy about it.

Q. That's the one he paid you ninety dollars for?

A. Yes.

Q. He said he sold it for a hundred and twenty?

A. Yes, that's what he told me.

Q. All right, go ahead.

A. And that he was looking for a nine millimeter Smith and Wesson Automatic. He described it in some detail. I knew what he was talking about right away but he went on to say that it was double-action and you didn't have to cock it, it would work like a revolver, you could cock it and fire it [259] or you could just pull the trigger. And I said yes, that I had two of them and that I had thought I would probably sell one, and he asked me if he could look at it and I showed it to him and he said that that's good, that's just what he wanted and he would be back next week with the money. And on the, I believe that was his fifth trip and the next week is when he came back and purchased it.

Q. During all of these contacts with Mr. Williford or Mr. Ferguson, did you ever make any effort to contact either of them, that is did they leave a telephone number or an address or any place and ask you to contact them?

A. Mr. Williford left his phone number and asked me to call him if I wanted, if I ran across anything good that he thought he could make money on.

Q. Did you ever call him?

A. No, I didn't.

Q. All right, now, did you ever have any contact with either of these people at any place other than your home?

A. No, I didn't.

Q. Did you ever ask them to come to your home or come back to see you?

A. No, no, I didn't.

Q. Now, did you hear from either of these people between May 26th or 1976 and January 13th of 1977?

A. No, I didn't. I got the, I got the impression that [260] Mr. Williford became, that Mr. Williford got mad at me because I asked him to sign that yellow form.

Q. All right.

A. And . . .

Q. Did you make any contact or effort to call him or contact him during that several months period?

A. No, I did not.

Q. On January 13th did Mr. Williford and Mr. Embree come to your house?

A. Yes, they did.

Q. All right, now. How long did they stay?

A. Well, they didn't stay very long at all. They both came in and Mr. Williford was, he asked me did I still have the other model 39 Smith and Wesson that I wanted, that I had when I sold him that one, and I told him yes, I still did have it. And he said, "Well, have you considered selling it yet?" And I told him, "Well, yes, I would probably sell it." And so he said, "Well, that's good. We'll come back next week with the money." And he didn't really stay very long at all, and as he was, there was these two Springfield rifles and a shotgun leaning in the corner, and he said, "Those Springfield rifles look, they are real nice Springfields." I

said, "Yes, they are, they are both almost mint. They are real fine Springfields." And he said, "Well, are they for sale?" And I said, "Well, I want to sell, [261] I want to sell one of them and, but I haven't decided which one yet." And he said, he said that he knew a doctor down in Olar that had been looking for one. I said, "Well, the one has never been fired and the other one has been fired a little but it's got the pistol grip stock on it, and that makes it, that stock is rarer and it's more, it's better with that stock on it." And so he said, "Well, would you consider selling both of them?" And I said, "Well, yes, I would." And he said, "Well, do you want to sell that shotgun, too? That shotgun looks good." And I said, "No, I can't sell that shotgun. A friend of mine brought the shotgun so that I could take it to another friend of mine so he could put a front sight on it." And so I—and he said, "But all of these guns are for sale?" And he pointed to the two Springfield rifles and there was a, there was also something else there, I believe it was a .22 magnum bolt action rifle there, and he said, "All of these guns are for sale?" And I said, "Yes." And he had seen the .22 magnum bolt action rifle all of his previous visits. It had just kind of become a fixture there in the corner.

Q. When he said, "All of these guns are for sale", how many guns was he talking about?

A. I think there was three of them excluding the shotgun which didn't belong to me and I couldn't sell it.

Q. Did you ever tell anybody that everything you have [262] is for sale, or all of your guns are for sale?

A. No, that's that's a ridiculous statement. I have got guns that people have offered me outrageous amounts of money for and I wouldn't sell them. That Johnson semiautomatic rifle over there I was offered five hundred and seventy-five dollars ($575.00) for it one time and it just, you know, I have had some of these things and I have built up over the years a collection of having almost everything that I wanted in the way of guns, and . . .

Q. Was there any discussion about the AK-47 automatic weapon on that last visit in January of this year?

A. Yes, he asked me did I know where he could get a barrel for one,and I said . . .

Q. Who is he?

A. Mr. Williford, I'm sorry, asked me did I know where he could get a barrel for me and I said, "Your best bet would be to look at Shotgun News, that Sherwood Industries or probably somebody like that that sells bunches of parts that, you know, that are parts dealers specializing in selling parts, that they might have one." But I didn't know of any barrels, I mean.

Q. Did he—state whether or not he told you that he had bought one, an AK-47?

A. Yes. He told me he had purchased one and that he paid five hundred dollars ($500.00) for it.

[263] Q. That is the same kind of weapon he tried to get you to sell him?

A. Yes.

Q. Pat, in any of these discussions was there any mention made about dope or liquor or any other illegal activities?

A. Well, he told me that he used to be a moonshiner and that he, you know, which a lot of people down there used to be, you know.

Q. Down around Olar?

A. Yeah, it's not really so much of a thing down there and that, and that he knew, you know, that he knew some people that I could trade some moonshine for guns, and I told him that I wasn't interested, that I wasn't really a drinker and if I was going to drink I was not going to drink moonshine. And so then he asked me another time, he asked me was there any, did I, did I smoke dope, and I told him that I had, I had smoked dope one time and it gave me a terrible stomach ache and that since then I had never, you know, I wasn't the least bit interested in anything like that. He said, "Well, I know some people that will trade dope for guns." And, you know, I just said, "Well, I'm not really interested," and . . .

MR. LOUTHIAN: I believe that's all I have, Pat, at this time. Would you answer any questions Mr. [264] Ruschky might have for you?

CROSS EXAMINATION:

BY MR. RUSCHKY:

Q. Mr. Mulcahey, that Pat's Government Surplus that you operate, is that all you do as far as a livelihood? Do you have any other source of income?

A. No, no, that's my source of income.

Q. Of course, your wife works for the Post Office?

A. Yes, sir.

Q. Mr. Mulcahey, when Kenneth Williford came to you, let's see, is it your testimony that he visited you four times in May?

A. I don't know exactly when it was.

Q. Well, let's do it this way. The first time he visited you he didn't buy anything?

A. That's right.

Q. The second time he purchased this Lugar?

A. That's right.

Q. That was the second time?

A. That's right.

Q. Government exhibit 2?

A. That's right.

Q. The third time he visited you he purchased the Tarus which is government's exhibit 3?

A. That's correct.

[265] Q. And the fourth time he came . . .

A. No, the fourth time he didn't purchase anything. The fifth time he came he purchased that piece right there.

Q. All right, the fifth time he purchased government's exhibit 4?

A. That's right.

Q. And then, of course, the sixth visit was in January?

A. That's right.

Q. A couple of months ago?

A. That's right.

Q. Was it your impression that he was trying to buy illegal weapons?

A. (No audible answer.)

Q. He was asking for machine guns, wasn't he?

A. He asked about them, yes, sir. It was my impression that he was—what my impression was was that he was, he was down on his luck, hard up, and he was looking for some way to make money. That's what my impression was.

Q. And he could make money by procuring anywhere he could an automatic weapon?

A. I guess so.

Q. All right. You testified that he made reference to friends or connections or somebody from up North who would be willing to come down here and purchase weapons?

[266] A. Yes, sir.

Q. That occurred to you to be illegal activity?

A. I told him at the time that that was. I did not, as I have said before, he was not, he did not impress me as a person that, he impressed me as a person that was ignorant of the possible repercussions of what he had planned.

Q. All right, but it was clear to you what he was trying to do. He was trying to buy an automatic weapon, or he was trying to supply guns to people up North?

A. (No audible answer.)

Q. Is that right? You understood what he was trying to do, and you tried to explain to him that it was against the law?

A. Yes.

Q. Is that a fair statement?

A. Well, I don't know if it's exactly fair or not. I told him that, that he—he did not definitely say that he was involved in these acts. He said that he was, that he was, if he could get it together he would become involved in these acts; that if he could find somebody with an AK-47 he could sell that AK-47 to another somebody.

Q. Okay. You knew from your experience as a federally licensed firearms dealer that all of what he was talking about was illegal, isn't that right?

A. Yes, sir.

[267] Q. That is why . . .

A. I told him that it was.

Q. You tried to caution him about that?

A. Yes, sir.

Q. Did it occur to you to call ATF and tell them about someone had just been to your residence inquiring about guns and automatic weapons and friends up North and talking like trying to be a trafficker in firearms?

A. No, it didn't.

Q. Why not?

A. Ah—I felt sorry for the guy. He came on with a whole song and dance about his impoverishment, his being screwed over by the Army, being screwed over by Charlie Daniels . . .

Q. Now, wait a minute, the Army didn't come out until the fourth visit, did it?

MR. LOUTHIAN: Your Honor, let him finish his answer, please.

THE COURT: Give him a chance to finish his answer.

A. I tell you the truth, I don't know. I'm telling you my general impression of the man. I don't know if that came out in the first visit. I think you are probably right, I think it probably did come out in the fourth visit, but I'm telling you my general impression of the man.

[268] Q. All right. Well, I think we understand your general impression. What I want to know if why you didn't call ATF, and it was just because you felt sorry for him?

A. I didn't want to cause him any trouble. He, according to him he had had more than his share.

Q. But you are aware, are you not, that Congress was concerned about the widespread traffic in firearms and that's why they passed this law. And here's a man inquiring about that and you don't bother to call the authorities? That is true, isn't it?

A. He did not, he did not—yeah, I guess. He told me that if I had some guns that I wanted to sell that he knew some people from up North that would come down and buy them. That's what he told me. So, does that answer your question?

Q. No, sir, it doesn't. It didn't occur to you to call ATF and say someone has just been here who says he has connections up North. I want to report him to you. Maybe even ATF would have asked you to cooperate with him so that they could have found these connections up North. It didn't occur to you, did it?

A. No, it didn't.

Q. All right.Mr. Mulcahey, have you ever referred to the ATF as the gestapo?

A. Yes.

[269] Q. Is that the way you feel about them?

A. Yes.

Q. What about these explosives Mr. Williford asked you if you knew where he could get explosives?

A. I told him where he could get explosives?

Q. Okay. Now, does a person having explosives or dealing in explosives have to have a license from ATF just like firearms?

A. I believe so. I believe you have to go down and buy, across from the Horseshoe at the University, you have to go and buy a license.

Q. All right. You are dropping your voice, Mr. Mulcahey.

A. My throat is getting kind of dry.

Q. Would you like some water?

A. That would be appreciated. Thank you.

Q. Now, it is your understanding that one who has explosives has to have a license?

A. That's right, yes.

Q. Have you ever had a license to have explosives like you had a license for firearms?

A. No, I haven't.

Q. All right, now, have you ever had explosives?

A. Explosives . . .

MR. LOUTHIAN: Your Honor, I object to this.

[270] THE COURT: Beg your pardon?

MR. LOUTHIAN: I object to the questions, Your Honor.

THE COURT: I'm sorry, my attention was diverted elsewhere. What was the question?

MR. RUSCHKY: Your Honor, the question was, I asked him if he had ever had an explosives license, and he said no. I asked if he had ever had any explosives. At that point Mr. Louthian objected.

THE COURT: I will sustain the objection. I don't think we are concerned with that here. He is not charged with having any explosives in his possession.

Q. Mr. Mulcahey, this 4473 that you had Mr. Williford sign, did you want him to sign this form before you would sell him another firearm?

A. Yes.

Q. Okay, so it was condition to selling him the firearm that he sign that form?

A. If you mean by that that I told him, "You just sign this thing and fill it out any way you want to and then you can get a gun from me", no, that's not true.

Q. No, I didn't mean to imply that. I just merely meant—the question was simply, he was required to fill out the form truthfully ...

A. Yes.

[271] Q. ... before you would sell him the firearm?

A. That's correct.

Q. All right, now. And your testimony is that you wanted him to do that because you thought he had been dishonorably discharged?

A. Yes.

Q. All right, now, did it bother you at all that the person who was with him and who was supplying the money for these three transactions admitted to you that he had been convicted of a crime that would carry a penalty of more than one year?

A. The person that was with him did not supply the money. Mr. Williford paid for all three of those weapons himself. George Ferguson never took a penny out of his pocket.

Q. All right. Did it bother you at all that Mr. Ferguson told you that he had been convicted of a felony?

A. That's not a felony, that's a misdemeanor.

Q. How do you know?

A. Because he told me it was. He said it was a misdemeanor but it could carry a sentence of over a year. That's, I believe, what he said because I was surprised that shoplifting could carry a sentence of that nature.

Q. Well, All right, in answering Mr. Louthian's question your statement was that he, Mr. Ferguson, told you that [272] he had been convicted of a crime that carried a penalty of more than one year, is that correct?

A. That's right.

Q. That was Mr. Ferguson's words?

A. That's right.

Q. Did it strike you that he would use those words when on one of these forms it says, "Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year?"

A. I don't understand the question.

Q. Well, instead of saying he had been convicted of a crime, isn't it unusual that he would throw in that extra language which, is it not, is peculiar to the firearms trade that you are concerned with people who have been convicted of a crime that carries more than a year?

A. Not if he had attempted to buy a firearm and been turned down for that reason.

Q. Do you think that's why he would have been familiar with the language?

A. It might very well be.

Q. It never occurred to you that perhaps these two gentlemen were working undercover for ATF?

A. No, not really.

Q. Are you sure that's not the reason why you asked Mr. Williford to sign that form, thinking that signing that [273] form would scare him off if he were working for ATF?

A. Mr. Williford did not impress me as an ATF agent at all. He really didn't.

Q. Not educated enough?

A. Well, not that so much as he just didn't impress me as being an ATF agent.

Q. All right, let's skip over to this January visit. You heard Mr. Williford testify that when he came in you acted very happy to see him. Now, my question to you is, were you happy because you thought that he had been mad that you made him sign this form and now he was back or were you happy because he had come back and you could sell another firearm?

A. I don't really remember being especially happy to see Mr. Williford. I mean Mr. Williford said that I was but I don't really remember being especially happy to see him.

Q. So if you weren't happy then you wouldn't have any reason for being happy?

A. Well, now, I don't know if I was happy or not. I mean, you know, there is all kinds of things that make peo-

ple happy and, but I don't remember seeing Mr. Williford being one of them.

Q. All right, now, your side of the conversation on January 13th about all of the firearms for sale, did I understand your testimony that it was Mr. Williford who first [274] asked if all that you had was for sale, referring to what he could see?

A. Yes, that's right.

Q. In other words, you were not the one who said, "All I have are for sale"?

A. Yes, that's correct. That's how he, when his hand, he did his hand like this and he said, "Are all these guns for sale?"

Q. And you replied, "Yes"?

A. And I said, "Yes, all those guns are for sale."

Q. Except the pump?

A. Well, the pump shotgun had been kind of mutually excluded from the conversation.

Q. Mr. Mulcahey, goverment's exhibit 4, that's the Smith and Wesson nine millimeter semi-automatic which Mr. Williford purchased from you in May of '76. Do you remember buying that from Mr. Mochel in March or April of 1976?

A. Yes, I believe I did.

Q. All right, now, Mr. Mochel is a federal licensed dealer, correct? At the time he was a federally licensed firearms dealer?

A. Yes, that's correct.

Q. And you used to be a dealer, right?

A. Yes, that's correct.

Q. And yet you purchased that firearm without filling [275] out one of these forms, isn't that right?

A. He told me that the gun was not his, that a friend of his had left if over there and that, and it wasn't his gun.

Q. Therefore it didn't have to go through his records?

A. I don't really know. I didn't—I don't really think so. I mean it wasn't, it wasn't his gun. It was a friend of his gun that had left it there.

Q. Mr. Mulcahey, between August 21, 1976, and December 3, 1976, some four months, you purchased six of these rifles, Lugar 223 caliber?

MR. LOUTHIAN: Objection, Your Honor. I think the record would show that there were four of them. Beg your pardon, there were three forms but there were six of those.

Q. All right, sir. Mr. Mulcahey, in a four months period you purchased six of these rifles, this Lugar M-14 223 caliber?

A. Yes, I did.

Q. All from Mr. Lain over in Lexington?

A. Yes, that's right.

Q. Now, this is goverment's exhibit 95 and we have two more here, government's exhibit 98 and government's exhibit 108. Now, did you purchase six of these in a four-month period and you only have three left on January 20th? [276] Can you tell me what happened to the other three?

A. These rifles—Mr. Lain has been a friend of mine for about ten years and these rifles were, he was able to buy these rifles at a good price so that he could sell them at a good price, but I, being a friend of his, he sells me things at a better price than he will sell other people things. So he called me and offered these rifles for sale for $158.08 and I told three of my friends about it and they asked me to buy, to buy each of them one. So that is, and so they gave me the money and I went over to Tom Lain's at various times and purchased them for them because I could get a better price than they could.

Q. I see. So you purchased three, one for each of three of your friends, and three you purchased for yourself?

A. I purchased, that rifle is already becoming a collector's item. On the side of it it's got something special written that will make it a collector's item. And what I had planned to do is to keep one myself and to put two up, and when my boys got older I would give them one each.

Q. Would you mind telling us the names of the three friends that you purchased these for?

A. I purchased one for Doctor Gale.

Q. G-a-l-e, is that the last name?

A. I believe so. And there was one for a Mr. Tollison.

Q. Tollison?

[277] A. Tollison. And I can't remember at this time who I purchased the third one for.

Q. All three of these friends?

A. Yes, sir.

Q. Live in Columbia?

A. No, sir.

Q. I'm sorry, where does Dr. Gale live?

A. Dr. Gale lives in Columbia.

Q. All right, Mr. Tollison?

A. Lives in Liberty.

Q. And do you know where the other fellow lives?

A. I can't remember who the other person was.

Q. But he is a good friend of yours, or just a friend?

A. The fact that I can't remember his name does not mean that he is not a friend of mine. I just do not, it just has slipped my mind temporarily.

MR. RUSCHKY: The Court's indulgence for a moment.

Q. Government's exhibit 45, this is a—well, you know more about guns than I do, Mr. Mulcahey. What is that?

A. It's a Marlin lever-action rifle.

Q. All right . . .

THE COURT: Speak up, sir.

A. Excuse me. I'm sorry. It's a Marlin lever-action rifle.

[278] Q. Do you remember where you got that?

A. No, I don't. I bought that, I bought a collection of guns all at one time and there were 14 or 15 of them, and this was one of them.

Q. Were these long guns?

A. Yes, sir, they were long guns with the exception, I believe, of one, of one handgun.

Q. All right, do you remember who you purchased this collection from?

A. No, I don't. I wrote down his name and I tried to find, I tried to find his, but I don't remember, but there was 14 or 15 of them, I believe.

Q. How about government's exhibit 65. I think this is one that Mr. Scroggie termed might possibly be a curio or relic.

A. That was part of the ones.

Q. Part of that collection?

A. Yes, sir.

Q. Well, let's jump right to the point, Mr. Mulcahey. I certainly do not mean to imply that you knew they were stolen, but are these, there were some 13 guns turned up here that turned up to be stolen. Were as far as you know these the guns that were purchased in this lump sum collection or would it help if I pointed them out to you individually?

[279] A. Some of them I know were, some of them—a single barrel shotgun just looks like a single barrel shotgun. I can't, there was, but these two were and several others of the ones that you pointed out I'm certain were.

Q. All right, how about the double barrel shotgun with the rabbit ears, government's exhibit 101? Was that part of the collection?

A. I'm not real sure.

Q. Okay. Now . . .

MR. RUSCHKY: The Court's indulgence for jut a moment, please.

That's all the questions I have, Your Honor.

MR. LOUTHIAN: I have nothing further.

JURY INSTRUCTIONS
(Criminal No. 77-00013)

[28] THE COURT: Now, Mr. Foreman, ladies and gentlemen, at this point in the trial you have heard the evidence presented by the parties, you have heard the final arguments of these attorneys. I want to caution you that the attorneys' arguments are not evidence of any kind. You are not to decide this case from the arguments of counsel. You are to make your factual determinations and to arrive at a fair and impartial verdict in this case from the testimony that you have heard presented to you from the witness stand and from the other evidence by means of exhibits that have been introduced during the trial of the case. I want you to bear in mind that these attorneys are advocates. They are partisans. They are trying to convince you that their side of the case should prevail. Now, you under

your oath as jurors, or I as the presiding judge of this trial, are not partisan in any sense of the word. Under our oaths of office under our solemn duties we must not be biased or prejudiced for or against any party. We must not be motivated by sympathy or public opinion or anything else in the case. This is a court of justice. We are here as part of this great system to dispense justice. That's the only justification for our being here today, to see that justice is done, justice to the defendant who sits there, as well as justice to the public interests whose interest is being [282] represented in this case by the prosecution.

Now, we must hold the scales of justice with even hands. The defendant and the public expect that you will carefully and impartially consider all of the evidence that has been presented to you during the trial of this case and arrive at a justice verdict, regardless of consequences. And I say regardless of consequences and I want you to know that during your deliberations you are not to be concerned in any sense of the word with what punishment the Court would hand out to the defendant should you find him guilty. That is a matter that is left entirely within my discretion and power as the presiding Judge of this trial and you in your deliberations should not be concerned with any potential type of punishment which may be given to this defendant should he be found guilty.

Now, we do, of course, permit these attorneys to give you their construction of what the evidence is and what the evidence shows and does not show, but again I say you must make your determination from the evidence presented from the witness stand. By like token, we even permit the lawyers to tell you what their conception of the law is that governs the factual issues in this case. There again, you are required to take the law from me as I give it to you. Now, if what I tell you is in keeping with what the lawyers say the law is, that's fine. Just bear in mind that it's my [284] responsibility to tell you what the correct principles of law are.

I want you to listen to my charge as a whole. Do not single out any one instruction to the exclusion of the others.

You as jurors must make your factual determinations and once you determine what the true facts are, then you will apply whatever legal principles that I give you to those facts and then you will arrive at a fair and impartial verdict.

I would want you to disabuse your minds of any conception of what you have that the law is or what the law should be. Please do not consider whether what I tell you the law is fair or proper because what I say to you is being taken down by the Court Reporter and if I should make an error in giving you a wrong or erroneous principle of law, then either party aggrieved thereby could appeal to our appellate court and that court, of course, would correct any errors that I would make in this case as it has done in other cases and it will probably do in the future.

Now, at the time you were selected as jurors in this case I told you that this indictment, and you will have it with you, Mr. Foreman and ladies and gentlemen, this white backed sheet of paper, that's been returned by a Grand Jury of this court against this defendant, is a more formal means by which to charge the defendant of the crime set forth [285] therein. This is the only offense for which the defendant is standing trial and you are not to consider any other type of offenses that may come to your mind based upon the evidence. We are concerned with this specific offense. That's the reason I want you to have this indictment with you when you go to the jury room. That's merely the contentions of the government. It is not any evidence at all against this defendant; neither does it give rise to any inference or presumption of his guilt.

Now, there are two types of evidence from which you the jury may properly find a defendant guilty of the offense with which he is charged. One is direct evidence. That is the testimony of an eye witness to an incident who tells you what he sees or hears or knows of his own knowledge. The other is circumstantial evidence which is the proof of a chain of circumstances pointing to the commission of an offense. Now, our law makes no distinction between the direct evidence and circumstantial evidence but merely requires that before convicting a defendant you the jury be

convinced of his guilt beyond a reasonable doubt from all of the evidence presented to you.

Now, our law presumes that this defendant is innocent of crime and although accused by means of this indictment he began this trial with a clean slate, with no evidence against him. Of course the law permits nothing but legal, [285] competent, relevant evidence to be presented before you the jury in support of the charges against him. That's the reason sometimes during the trial we had to excuse you from the courtroom while we discussed whether or not the Court would permit a certain type of evidence to be presented to you. So I say to you that this presumption alone, presumption of innocence, is sufficient to require that you acquit this defendant unless and until you the jury are convinced beyond a reasonable doubt that the defendant is guilty of the charges against him contained in this indictment.

Now, I would say to you ladies and gentlemen that a reasonable doubt is not a fanciful or a frivilous doubt. It is a doubt based upon reason and common sense. It's been said that it's a doubt for which you can assign a reason. It's also been said that it's a doubt which would cause a reasonably prudent person to hesitate in the handling of important affairs in his own life. Of course, you are expected to use your good judgment, your common sense, your knowledge of human beings and human nature. I would say this, that it is rarely possible to prove anything to an absolute certainty, but no defendant is to be convicted on mere suspicion or conjecture.

Now, reasonable doubt may exist in any case not only from the evidence produced but also from the lack of evidence. Now, since the burden of proof is upon the prosecution to [287] prove the defendant guilty beyond a reasonable doubt of every essential element of the offense charged, the defendant has the right to rely upon the failure of the prosecution to present such proof. In other words, the defendant is not called upon to prove his innocence; the prosecution must prove him guilty. Thus a defendant may rely upon evidence brought out on cross examination of the prosecution witnesses. Bear in mind that our

law does not impose upon a defendant the duty of calling any witnesses or producing any evidence. So I would say to you that a reasonable doubt exists in any case when after a careful and impartial consideration of all of the evidence you the jury are not convinced of the defendant's guilt beyond a reasonable doubt and to a reasonable moral certainty.

Of course, I have indicated to you that you are the sole judges of the facts and there is no appeal from your determination of what the true facts are. And as the sole judges of the facts that necessarily means that you are the sole judges of the credibility or the believability of the witnesses who have appeared before you. Each witness who has testified, even the one whose deposition testimony was published to you, was sworn before they testified and, of course, they are presumed to speak the truth, but this presumption of truthfulness may be outweighed by many matters and things. Again I say you are expected to use your good [288] judgment, your common sense and your knowledge of human nature in evaluating the testimony of the various witnesses. Consider if you will a witness' intelligence, his demeanor upon the witness stand, the manner in which he testified. Is his testimony ringing true with you? Does it convince you that he is telling the truth, or do you have serious doubts about his veracity or truthfulness? Consider also a witness' interest in a case, a witness' connection with either side of the case, how a witness may be affected by your verdict, whether a witness' testimony is either substantiated or contradicted by other evidence in the case. Of course, if it is shown that a witness makes contradictory statements while he is testifying or if he has made some other statement at some earlier time that's in conflict with what he says from the witness stand, all of those are matters which you should take into consideration in evaluating and giving credence or believability to a witness' testimony. Of course, you have it within your power to believe a portion of a witness' testimony or disbelieve another portion. You may believe one witness against several and you may believe the testimony of several against one. You surely may disbelieve a witness' testimony in its

entirety if you are convinced that witness is not worthy of belief. Of course, you would not do it arbitrarily but if you have good cause to disregard or disbelieve a witness [289] completely that's within your province. I would say that inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to discredit such testimony. We know that two or more people witnessing an incident or any transaction may see or hear it differently. An honest misrecollection like failure of recollection is not an uncommon occurrence. So in weighing the effect of a discrepancy, if there is such, consider whether it pertains to a matter of importance or an unimportant detail and consider whether such discrepancy results from innocent error or from willful falsehood.

Now, a defendant in a criminal case in this court has the absolute constitutional right to either testify or to refrain from testifying as he himself sees fit. Now, if a defendant does elect to take the stand and testify in his own defense as the defendant in this case has done, then he becomes as any other witness and you the jury must determine his credibility and his believability and give his testimony such weight as you think it deserves.

Now, ladies and gentlemen, coming directly to the charges against this defendant, this indictment provides that beginning on or about the 12th day of May, 1976, to the return date of this indictment which is January 19, 1977, that date is stamped right there, Mr. Foreman, during this period then, from May 12, 1976, to January 19, 1977, Patrick [290] M. Mulcahey unlawfully and knowingly did engage in the business of dealing in firearms without being licensed to do so as is required by the Gun Control Act of 1968 which is a federal gun control statute. And it's alleged that such acts on his part constituted a violation of sections 922(a)(1) and 924(a) of Title 18 of the United States Code.

Now, Section 922(a) reads as follows and I quote: "It shall be unlawful for any person except a licensed importer, licensed manufacturer or licensed dealer, to engage in the business of importing, manufacturing or dealing in firearms

or ammunition, or in the course of such business to ship, transport or receive any firearms or ammunition in interstate or foreign commerce". That means from one state to another or from a foreign country. Now, Section 924 (a) of Title 18 of the United States Code provides as follows and I'm quoting: "Whoever violates any provisions of this chapter, meaning the Gun Control Act of 1968, or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be guilty of an offense against the laws of the United States."

Now, ladies and gentlemen, Section 921(a)(11) of [291] Title 18 of the United States Code defines dealer as follows, and I quote again: "The term 'dealer' means, (a) any person engaged in the business of selling firearms or ammunition at wholesale or retail, (b) any person engaged in the business of repairing firearms or making or fitting special barrels or stocks or trigger mechanisms to firearms, or (c) any person who is a pawn broker. The term 'licensed dealer' means any dealer who is licensed under the provisions of this chapter." In other words to be a dealer in firearms under this Gun Control Act a person must have a federal license to transact such business or deal in firearms.

Now, as used in these statutes a dealer means anyone who is engaged in any business of selling firearms and such business is that which occupies, attention and labor for the purpose of livelihood or profit. Attention and labor for the purpose of livelihood or profit, as I say. Thus, while the government need not prove that the defendant actually made a profit from his sales of firearms it must show a willingness on the defendant's part to deal, that he had a profit motive and it must also show a greater degree of activity on his part than an occasional sale made as a hobby as contrasted to a business activity. Thus, Section 922(a)(1) does not require that the government establish that a person engaged in the business of dealing in firearms actually makes a profit, even though the dealing activity [292] requires time, attention and effort. To be convicted of violating this

section it is not necessary that a defendant's primary business be dealing in firearms or that the dealing in firearms be on a profit-marking basis. But as I have just told you, before the prosecution would be entitled to a conviction in this case it must prove that the defendant was doing more than engaging in a hobby and that he only made an occasional sale.

Now, in order to prove the defendant guilty as charged the prosecution is not required to prove that the defendant knew his activity was unlawful or that he acted with intent to violate the Gun Control Act Sections which I have just read to you. Such considerations are irrelevant to your determination of the guilt or innocence of the defendant in this case. Since the Gun Control Act of 1968 is a regulatory statute adopted by Congress to control and limited the trafficking in firearms of all kinds, it is not incumbent or necessary for the prosecution to prove that the defendant acted with the specific intent to commit the acts alleged in the indictment. However, the prosecution must prove that the defendant knowingly and voluntarily did acts which were prohibited by the federal statutes or failed to do some acts required by the law to be done, and it is immaterial whether the defendant actually knew he was violating the law by his actions or his omissions.

[293] Now, the state of mind of a defendant or the knowledge with which he acted may be proved by circumstantial evidence and I would say to you that it is rarely possible to prove it by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or does not do, there can be no eye witness account of the state of mind with which such acts were done or omitted. But what a defendant does or fails to do may indicate knowledge or the state of mind with which his acts were done or omitted. It is reasonable to infer that a person ordinarily intends or knows the natural and probable consequences of acts knowingly done or knowingly omitted. In determining the issue of the defendant's knowledge or state of mind, you the jury are entitled to consider any statements made or acts done or omitted by him and all other facts and circumstances in evidence which may aid in

your determination of what was his state of mind or knowledge at the time such acts were done or omitted.

Now, the legal issue, the factual issue which you the jury are required to determine in this case is not so very complex. There are two elements of the offense with which the defendant is charged which the prosecution must prove beyond a reasonable doubt in order to gain a conviction against this defendant. First, the prosecution must prove that the defendant knowingly engaged in the business of dealing in [294] firearms as I have already defined that business to you, during or about the time alleged in the indictment, that is from May 13th, 1976 to January 19th, 1977. Secondly, the prosecution must prove that while carrying on such business the defendant did not have a valid federal license at that time as is required by the federal Gun Control Act of 1968 for one dealing in firearms.

Now, you will note that this indictment alleges that the defendant did certain acts unlawfully and knowingly. Now, unlawfully means contrary to law. Hence, to do an act unlawfully means to do knowingly and voluntarily something which is contrary to the law even though you don't know that it is against the law. To act knowingly means to act voluntarily and intentionally and not because of mistake or accident or inadvertence or any other innocent reason because we do not want any defendant to be convicted in this court because of some accident or mistake or any other innocent reason.

Now, the defendant contends that he was a victim of what we call illegal entrapment as to the crime charged in the indictment. Now where a person has no previous intent, purpose, predisposition or inclination to violate the law but is induced or over-persuaded by law enforcement officers or their agents to commit a crime, such defendant then is a victim of what we term "illegal entrapment", and [295] the law as a matter of policy forbids his conviction under such circumstances. On the other hand where a person already has the readiness, predisposition, willingness or inclination to break or violate the law, the mere fact that government agents provided what appears to be a favorable opportunity to violate a law is not entrapment. For exam-

ple, when the government expects that a person may be engaged in some illegal activity such as selling bootleg whiskey or dealing in firearms without the proper license, it is not entrapment for a government agent to pretend to be someone else and to offer either directly or through an informer, decoy or an undercover agent, to give such a person an opportunity to attempt to purchase a gun from such suspected person. Thus, if you the jury should find beyond a reasonable doubt from the evidence presented to you in this case that before anything at all occurred respecting the alleged offense involved, the defendant was ready, willing and able to deal in firearms without a license whenever such opportunity was presented or afforded to him, and that government officers or their agents did no more than offer that opportunity, then you should find that the defendant is not a victim of such illegal entrapment which would require that he be acquitted. On the other hand, if the evidence in this case should leave you with a reasonable doubt whether the defendant had the previous intent, purpose, predisposition or [296] inclination for committing the offense of the character charged against him and that he did so only because he was induced or persuaded unduly by some officer or agent of the government, then it is your duty to acquit him.

You have heard the evidence, ladies and gentlemen, and it's for you to say what is the situation in reference to this contention of the defendant.

As I conclude I would say to you ladies and gentlemen that there is nothing peculiarly different from the way that you consider the proof in this criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good judgment, your common sense, consider the evidence for only those purposes for which it was presented and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human begins. If the defendant be proved guilty, say so; if not proved guilty, say so. Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in this case. I would

also ask you to remember that the question before you can never be, will the government win or lose this case, because our government always wins when justice is done regardless of whether your verdict is guilty or not guilty.

Now, I have asked the Clerk, Mr. Foreman, to prepare [297] the form of verdict and I have it here on this blue-backed sheet of paper. We have the caption of the case and criminal docket number and the word Verdict. Then we have, "We the jury unanimously find the defendant, Patrick M. Mulcahey," and then a long line. Based upon your view of the evidence you will insert there either "guilty" or "not guilty" depending, of course, upon your view of the evidence. Then you would sign your name, sir, above the line under which your name is typed in as Foreman. And by your signature you would be certifying to the court that all 12 of you jurors have agreed to whatever verdict you have returned. Then you would merely insert the date where it says March blank, 1977; and in that connection your verdict whatever it must be must represent the considered judgment of all 12 of you. All 12 of you must agree to it. In other words, your verdict must be unanimous.

In conclusion I would say that it is your duty as jurors to confer with each other and to discuss the evidence and to deliberate with a view of arriving at a verdict in this case if you can do so. You surely are expected to swap your views, to discuss your opinions and to share your sentiments with your fellow jurors. That's the reason we have 12 people serving on our juries in a criminal case. We want the considered judgment of all of you after a careful consideration of all of the evidence. Now, during your [298] deliberations do not hesitate to change your opinion if you are convinced that your first view was wrong or erroneous. But I would not ask you to give up a deep-seated or firm conviction as to the evidence merely because of the opinion of your fellow jurors or for the mere purpose of arriving at a verdict, realizing that when your verdict was arrived at and received by the Court you would be free to go your way. I want you to understand and remember that you are not partisans, you are judges, you are judges of the facts, and

as I told you in the very beginning of any charge your sole purpose for participating in this trial is to see that justice is done, justice to the defendant and justice to the public whose interest is represented by the prosecution.

Now, I'm going to let you be excused from the courtroom. I have got to give counsel the opportunity to take any exceptions to my charge for the record they may want to. I also will give them an opportunity to make any additional requests for charge that I may have inadvertently omitted. It may be necessary for me to bring you back; otherwise the Marshal will take you to your jury room and you will commence your deliberations. Once you have arrived at a unanimous verdict and you, Mr. Foreman, have filled out the verdict form as I have instructed you, dated it, signed your name, then we will bring you back into the courtroom to receive your verdict. Now, the Marshal will bring along the indictment, form of verdict, and all of these exhibits. That is going to be something of a job, but if you want all of these guns down in the jury room with you you are entitled to have them. Now, I see, Mr. Foreman, that you are kind of shaking your head. Do you prefer that the exhibits not be brought?

THE FOREMAN: I don't believe so.

THE COURT: You are surely entitled to them. I won't send them down initially since all of you seem to be of one accord that you don't think it is necessary, but they are here for your benefit and don't hesitate at all during the deliberations to tell the Marshal who will be stationed outside your door to bring them to you if you or any one of you has any feeling that you want any or all of them there because they are here available to you.

Now, insofar as these other exhibits, these documents and what-have-you, that have been introduced in evidence, that poses no problem so I will send those along but all of these exhibits have been introduced into evidence for your benefit and they are available to you and I want you to have them if any one of you should want them. So at this time I will ask you to step outside for a few moments.

* * * *

[302] THE COURT: Mr. Foreman, ladies and gentlemen, I meant to comment to you at the end of my charge that if

during your deliberations you had any legal questions or a matter that was worring you, I wanted you to feel free to ask it. I usually do that but I neglected to do so in your case. But I'm glad that you did take the liberty of contacting me because that's what I want you to do any time you have any legal question because it's my responsibility as presiding judge of this trial to try to answer any questions that you have pertaining to any legal matter in question.

I'm not in a position or I don't as a practice make any comment or express any opinion about the facts in the case, about the evidence. We are permitted in our federal courts to comment upon the facts or the credibility of the witnesses or what-have-you if we see fit so long as we feel [303] that it is ultimately your responsibility to find the facts and judge the credibility. But I have confidence in my juries to the extent that I never try to hold my opinion about the facts or merits of the case on the jury because I want the juries to decide those without any indication from me as to how I may personally feel about the case, and I surely want you to understand that nothing that I say during the trial or during my charge should be taken by you as any intimation of how I might personally feel about the case. I surely think it is completely immaterial from your standpoint as to how the presiding judge may feel. This is a little off of what I brought you back for. I have this message from you, Mr. Foreman, in which you say that you want the law of entrapment. I assume that you want me to repeat what I told you earlier about the law of entrapment. Of course, as a preliminary to that I would say that of course we have what we call an illegal entrapment. That is where some person who has no inclination or has no predisposition or motive or intent or purpose to violate the law at all, has some law enforcement officer or some undercover agent or what-have-you to come to him and put such persuasion upon him that he gets an innocent individual who has no desire or motive or intent to violate the law to actually violate the law. That that is what I said is illegal entrapment. Now the defendant in this case asserts that he was such a victim of such illegal [304] entrapment as to the

crime that he is charged with in this indictment, that is the carrying on of the business of a firearms dealer. Now where a person has no previous intent, motive, design, inclination or predisposition to violate the law but is induced or talked into it or persuaded to do it by law enforcement officers or their agents, which he would not be inclined to do without this over-persuasion or this inducement by the law enforcement officers, then he is a victim of entrapment under those circumstances. And our law as a matter of public policy forbids the conviction of a defendant who has had that forced upon him or induced upon him to convict, I mean to commit the crime. He cannot be convicted under those circumstances. Ordinarily where a person already has the readiness, willingness, motive or design or the intent or the predisposition or whatever you want to call it to commit the offense with which he is charged, the mere fact that the government agents, whether they be undercover agents or what-have-you, where these government agents provided what appears to be a favorable opportunity to violate the law, this does not constitute entrapment. For example, as I told you earlier, where the government has cause to suspect that a person may be engaged in violation of some of our laws such as making and selling moonshine whiskey in violation of a federal as well as a state law or of selling firearms without a federal license as the [305] defendant is charged in this case, it is not entrapment for a government agent or one working with the government agency to pretend to be someone else and to offer either directly or through an informer or a decoy or undercover agent to give such a person an opportunity to purchase a gun or whiskey from such suspect person. In other words, as long as all the government agents are doing is offering such person an opportunity to break the law and he is not overly induced or overly persuaded to do it, then that is not entrapment. However, if you the jury should find beyond a reasonable doubt from the evidence in the case that before anything at all occurred with respect to the alleged offense with which the defendant is charged, that the defendant himself was ready, willing and able to deal in firearms without a license whenever such opportunity was presented and that the

government agents or officers did no more than offer the defendant the opportunity to sell the guns, then you should find that the defendant is not a victim of such illegal entrapment which would require that he be acquitted. Now, on the other hand, if the evidence in the case should leave you, the jury, with a reasonable doubt whether the defendant had such previous intent, purpose, design or motive or inclination or predisposition to commit such an offense as charged in the indictment and that the defendant did so only because he was induced or persuaded by the government officer or [306] agents, then you should acquit him. Now it is just that simple, whether or not the defendant was ready, willing and able to do it and all the government agency did was afford him the opportunity and he did it, or whether he was a law-abiding citizen sitting out there and the government agents came in and induced him or persuaded him, when he had no inclination, no predisposition, intent, to violate the law, then in that latter circumstance he can't be convicted but under the former circumstances he can be. Does that answer your question now?

THE FOREMAN: Yes, sir.

THE COURT: Do you have any other questions of legal matters that may be worrying any of you?

In the Supreme Court of the United States

No. 82-1041

UNITED STATES, PETITIONER

v.

ONE ASSORTMENT OF 89 FIREARMS

ORDER ALLOWING CERTIORARI. FILED February 22, 1983

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.